TAN KEOK YIN

v.

CHEAH SAW HONG

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[DIVORCE PETITION NO. S7-47-796-1987]
26 OCTOBER 1990

FAMILY LAW: *Divorce - Contested petition - irretrievable breakdown of marriage - 2 year separation - Inquiry into the facts - Conduct of parties - Applicability of English law - Grave financial or other hardship - Standard of reasonable behaviour - Test in Katz v. Katz - Burden of proof - Purpose of statute - Law Reform (Marriage and Divorce) Act 1976, ss. 53(1)(2), 54(1)(b).*

The parties were married in 1969 and have three children aged 20, 18 and 14 years. As the matrimonial problems could not be resolved and as the parties had lived apart for two years, the husband H petitioned for a divorce and the wife W respondent contested the petition, denying that the marriage had irretrievably broken down, alleging that the parties had been happily married for 15 years (after a courtship of six years), that she had always been a good wife and mother and that she had not done anything wrong to warrant H leaving the house and family. W also said that taking into consideration the interests of the children, it would be wrong in principle to dissolve the marriage.

H relied on the two year separation and contended that W was aggressive, domineering and a violent person, adding that as a result of W harassing him, he had obtained a restraining injunction against her. W denied the allegations.

Both parties refused to give evidence *viva voce* and neither did they call any witnesses although the Court indicated that oral evidence would be helpful. The Court therefore relied on the affidavit evidence to arrive at its decision.

Held

[1] H had not stated what the nature of matrimonial difficulty was; W had put up a reasonable explanation to support her contention that the marriage had not irretrievably broken down.

[2] The test of standard of behaviour which should be adopted in construing s. 54(1)(b) of the Law Reform (Marriage & Divorce) Act 1976 (the Act) is that the respondent must behave in such a way that the petitioner cannot reasonably be expected to live with the respondent and it is for the Judge to decide this question - *Katz v. Katz* followed.

[3] (a)Bearing in mind that the marriage was preceded by a six-year courtship and that it had lasted some 15 years, it is highly incredible that W would suddenly turn vicious and behave in the manner as alleged by H;

(b) if the allegations made by H were true, he should have no hesitation in going to the witness box and testifying to the truth of what he had allegation of W;

(c) in failing to do so the Court cannot accept H's allegations particularly when they could not be reconciled with what W had said in her answer.

(d) the allegations were made to hide the fact that H wanted a divorce in order to continue with his infidelity.

[4] (a)The burden of proving that W has behaved in an unreasonable manner as provided in s. 54(1)(b) of the Act is on H and not W since it is the former that made the allegations.

(b) The fact that the marriage has lasted for 15 years is consistent with the assertion of W that she has done nothing wrong.

(c) Bearing in mind the fact that H had extra marital affairs with at least three other women (which has not been challenged) and that W had tolerated such activities, this is a clear indication that W is not a vicious person.

[5] The Act is not enacted for the purpose of encouraging divorce but to buttress the stability of marriage where it is possible to do so.

[H's petition dismissed.]

Cases referred to:
Ash v. Ash [1972] Fam 135
Katz v. Katz [1972] 1 WLR 955
Rukat v. Rukat [1975] 1 All ER 343

Legislation referred to:
Law Reform (Marriage & Divorce) Act 1976, ss. 5, 53(1)(2), 54, (1), (2), (1)(b), 106
Matrimonial Causes Act 1973 [UK], ss. 1(1), 1(2), 1(2)(b), 1(2)(e)

For the husband petitioner - Y.N. Foo; M/s. Shearn Delamore & Co. & Drew Napier
For the wife respondent - John Fam; M/s. Lee Fam Wong

JUDGMENT

Lim Beng Choon J:

At the outset I must confess that I find it rather difficult to arrive at a decision which would be fair to both the parties to this divorce petition and expecting neither heroic virtue or selfless abrogation from either. This is so because both the husband petitioner and the wife respondent refused to subject themselves to *viva voce* examination at the trial of this case on 22 November 1989; neither did they call any witnesses to testify for them. I had indicated to them that it would be of assistance to this Court if both parties were prepared to give oral evidence on oath. However they refused and preferred to let me make a decision based on their respective affidavit evidence. Under the circumstances I can only do the best I can with the materials before me.

In this divorce petition filed on 11 December 1987 the husband petitioner averred that he married the wife respondent on 8 July 1969 at the Registry of Marriages, Georgetown, Penang under the Civil Marriage Ordinance 1952. They had lived and cohabited in Petaling Jaya. There are three children in the family. The eldest daughter was born on 27 May 1970, the second son was born on 30 May 1972 and the third daughter was born on 22 September 1976. The matrimonial problems were referred to the Reconciliatory Tribunal Petaling Jaya and the said tribunal had issued a certificate certifying that they had not been able to resolve the matrimonial problems to the satisfaction of the parties. The husband petitioner thereupon averred that the marriage had irretrievably broken down since the parties had lived apart for a continuous period of at least two years. Appropriate arrangements were made for the custody, care and control and maintenance of the children.

The wife respondent contested the petition and in her answer she denied that the marriage had broken down irretrievably because:

(a) the respondent had at all times been a good and responsible wife and mother to the petitioner and the children;

(b) the respondent had been happily married for the past fifteen years until the petitioner suddenly left home without any cause or reason;

(c) the marriage was preceded by six years of courtship and only after careful consideration did the parties go into matrimony;

(d) the respondent had at all times stood by the petitioner in all his adversities and has at all times given the petitioner whatever support and love that is expected of a wife;

(e) the respondent had at no time done anything wrong to warrant the petitioner leaving the house and family.

The wife respondent also averred that the husband petitioner's desertion had taken a heavy toll on the children's education and happiness and the respondent wholly attributed this to the petitioner's absence. The respondent believed that the marriage was never irretrievably broken down and from the petitioner's close contacts with his children, the petitioner would return to the family. Finally the wife respondent averred that she firmly believed that in the circumstances and particularly having considered the interest of all parties concerned especially the children, it would be wrong in principle to dissolve the marriage.

In response to the wife respondent's contentions the husband petitioner put in his reply on 16 December 1988. In the reply he averred *inter alia* that:

(i) the parties had lived apart for a continuous period of nearly five years;

(ii) it was the respondent's aggressive, abusive and domineering behaviour which permeated the 15 years of marriage that had destroyed any love, trust and respect which the petitioner had in the respondent;

(iii) the respondent was a violent person with an uncontrollable temper, often attacking the petitioner physically;

(iv) the respondent constantly used foul and abusive language both on the petitioner and the children of the marriage;

(v) the respondent would insist on having her way in all aspects of the marriage and would resort even to emotional blackmail and threats to achieve her ends. For example, the respondent would knock her head against the cupboard so that she could frame the petitioner for physical violence and bang the doors of the house in the middle of the night to create a commotion and frighten the children;

(vi) the respondent demeaned all those who had to be in her presence and was besmirched by a general lack of self dignity, honour and decorum and by reason thereof the petitioner was often subjected to public ridicule;

(vii) the petitioner suffered considerable mental anguish and distress including palpitations and was on the verge of a severe mental breakdown.

The husband petitioner went on to aver that after leaving the matrimonial home on 15 March 1984, the respondent not only refused to acknowledge and accept that the marriage had broken down but began a trial of harassment and harmful activities to discredit the petitioner

and undermine his position in his work place such as calling and imposing the petitioner's superior and making a number of wild allegations on his character and person, with the intention of discrediting him and jeopardising his position and status and disturbing close friends and relatives of the petitioner by disclosing distorted accounts of the petitioner's private life and activities so that he would be placed in a bad light. On account of the harassment and completely intolerable behaviour the petitioner was compelled to apply and obtain an order of injunction from the Court to restrain the respondent from assaulting, molesting and annoying or forcing her society upon or otherwise interfering with the petitioner, his friends, colleagues and superiors. The order of injunction was made on 11 July 1986. The respondent's application to set aside the injunction on 23 June 1987 was dismissed by the Court. The husband petitioner went on to say that he could and would not live with the respondent again. Although he affirmed that he would continue to provide the necessary maintenance and would make financial provisions for the support, care and education of the children he firmly believed that the marriage had irretrievably broken down and that in all the circumstances of the case it would be in the interests of all parties especially the children to put an end to the marriage and reduce the bitterness and trauma that had been ongoing since March 1984. Finally the husband petitioner admitted that he was and still is staying with another woman whom he intended to marry once the *decree* for divorce was granted.

The wife respondent by consent of all parties obtained leave of the Court to file a rejoinder. In that rejoinder she denied all the wild mischievous and unsubstantiated accusations made by the petitioner in his reply and put him to strict proof. She went on to say that if indeed the accusations were true it would appear inconsistent with the fact that the marriage had lasted for 15 years. She also said that the husband petitioner had three extra-marital affairs with other women but she did not object as she viewed these extra-marital activities as only a passing fancy on the part of the petitioner. The respondent then went on to name the women, the years and the places in which the affairs occurred. She also said that the woman whom the petitioner was living with was and still is a married woman. Despite these extra-marital affairs the respondent said she was prepared to accept them as part of married life because she firmly believed that the petitioner would eventually return to the family.

The law applicable to this divorce petition is s. 53(1) and (2) of the Law Reform (Marriage & Divorce) Act 1976 (hereinafter referred to as "the Law Reform Act") which reads:

> (1) Either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down.
>
> (2) The Court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the break down of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a *decree* for its dissolution.

The proof of the breakdown of a marriage is provided in s. 54(1) of the Law Reform Act. The provisions of that section relevant to the present case is para. (b) and (d) of that section which reads:

> 54(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the Court shall have regard to one or more of the following facts, that is to say:
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

Subsection (2) of s. 54 of the Law Reform Act enjoins the Court to consider the matters prescribed therein before deciding whether a marriage should be dissolved and it reads:

> (2) In considering whether it would be just and reasonable to make a *decree* the Court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a *decree nisi* subject to such terms and conditions as the Court may think fit to attach, but if it should appear to the Court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

In enacting s. 54 of the Law Reform Act, the legislature was in fact adopting the principles of s. 1(1) and (2) of the English Matrimonial Causes Act 1973. I need only to reproduce the relevant provisions of the said s. 1(1) and (2) which are in these terms:

> 1.(1) Subject to s. 3 below, a petition for divorce may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts, that is to say:
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (e) that the parties to the marriage had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereinafter in this Act referred to as 'five years' separation).

Upon a careful scrutiny of s. 54 of our Law Reform Act there are two striking features of the said section that need to be taken into consideration. Firstly upon proof of the fact that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, the petitioner has *prima facie* proved that the marriage has irretrievably broken down, if, but only if, the respondent is not contesting it or has no answer as to why the respondent would allow the petitioner to live separately from her or him as the case may be. Secondly when the respondent is contesting the petition and is able to put up a reasonable answer that notwithstanding the two-year separation the marriage has not irretrievably broken down then the Court must pursuant to subsection (2) of the said s. 54 consider all the circumstances including the conduct of the parties and the interests of the children of the marriage before deciding whether the marriage should be dissolved.

The provisions of s. 1(2)(e) of the English Matrimonial Causes Act 1973 read with s. 5 of the said Act likewise provide that a respondent can oppose a grant of *decree* based on the five years' separation on the ground that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all circumstances be wrong to dissolve the marriage. Upon such opposition the English Court would have to consider *inter alia* all the circumstances including the conduct of the parties and the interests of the children before it can decide whether the marriage should be dissolved.

In *Rukat v. Rukat* [1975] 1 All ER 343 (which case was brought to my attention by Counsel for the petitioner) Ormrod LJ said at p. 352:

> It is quite plain from s. 1 of the Act that from that time onwards the basis of dissolution of marriage is the irretrievable breakdown of the relationship between the spouses, and so clearly the whole policy of Parliament was, and is, to create a state of affairs where, once the

real relationship of husband and wife between the parties has gone, and gone for good, the legal relationship of husband and wife should as far as possible be removed or dissolved so as to bring the legal situation into line with the factual situation. But Parliament did not go quite so far because in s. 2 it limits in a rather curious way the powers of the Court by prescribing in effect what evidence the Court must have before it could come to a conclusion that a marriage had irretrievably broken down, and consequently Parliament prescribed the well-known five 'facts' or situations. In this case we are concerned with the last of those, that is, five years' separation - the strongest possible evidence, one would have thought, that the factual relationship between husband and wife had permanently broken down. But parliament decided to include s. 4, to provide a defence in certain limited circumstances, mainly with an eye on wives who might suffer great hardship at the hands of unfaithful husbands who were able to take advantage of the five year separation to get a divorce which the wives could otherwise have withheld.

Reverting to the present petition it is to be noted that the husband petitioner had in the divorce petition relied completely on the two year separation as a ground for getting an order of dissolution of the marriage. True he had also said in the petition that Reconciliatory Tribunal Petaling Jaya had certified that they were unable to resolve the matrimonial difficulty but he had not said what was the nature of the matrimonial difficulty. More importantly his reference to the said Reconciliatory Tribunal was necessary simply because s. 106 of the Law Reform Act required him to do so before he could petition for a divorce. Against this stand taken by the husband petitioner the wife respondent, in her answer (which I have reproduced earlier and I need not repeat it), had put up a reasonable explanation to support her contention that the marriage has not irretrievably broken down. Thereupon in his reply, the husband petitioner added a twist to his petition by relying on fact (b) of s. 54(1) of the Law Reform Act namely that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with her and he gave a long list of allegations of misconduct on the part of the respondent which I have earlier stated and I need not repeat those allegations again. These allegations were categorically denied by the wife respondents.

Now what is the standard of behaviour to adopt in construing s. 54(1)(b) of the Law Reform Act? A useful test is stated by Sir George Baker P in *Katz v. Katz* [1972] 1 WLR 955 at 960:

The standard is that he must behave "in such a way that the petitioner cannot reasonably be expected to live with (him)." That is the test. It is for the Judge not the petitioner alone to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the Judge to say whether the marriage has irretrievably broken down. To that extent I agree with what Bagnall J said in *Ash v. Ash* [1972] Fam 135. The Court must consider the effect of the behaviour on the particular petitioner and ask the question is it established, not that she is tired of the respondent, or, colloquially, fed up with him, but that she cannot reasonably be expected to live with him? In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the Court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him.

Following the test laid down in the *Katz v. Katz* case I would certainly agree that if the allegations of misconduct made by the husband petitioner against the wife respondent were true he would be entitled to an order of dissolution of the marriage. But are they true? Bearing in mind that the marriage was preceded by a 6-year courtship and it had lasted some 15 years, it is highly incredible that the wife respondent would suddenly turn vicious and behave with a gorgon-like monstrosity. Furthermore if the allegations made by him were true he should have no hesitation in going to the witness box and testifying to the truth of what he had alleged. He could easily have called his superior or any of his friends to whom he said the

wife respondent had made derogatory remarks about him to testify on his behalf. In failing to do so I cannot accept his allegations particularly when they could not be reconciled with what the wife respondent had said in her answer. To my mind the allegations were made to hide the fact that he wanted a divorce in order to continue with his infidelity. In arriving at this conclusion I have not overlooked the fact that the husband petitioner had obtained an injunction refraining the wife respondent from harassing him, his superior and/or his friends and associates. But it is trite law that an interim injunction would be granted so long as the applicant could make out a triable issue - it is granted to maintain the *status quo* pending the trial of the substantive matter. An injunctive order cannot have the effect of *res judicata*.

Turning to the affidavit evidence of the wife petitioner, I have borne in mind that she too did not choose to give oral evidence under oath. Be that as it may the burden of proving that the respondent has behaved in an unreasonable manner as provided in s. 54(1)(b) is on the petitioner and not the respondent since it is the former that made the allegations. Furthermore as the marriage has lasted for 15 years it is consistent with the assertion of the wife respondent that she has done nothing wrong. Bearing in mind that the husband petitioner had extra marital affairs with at least three other women (which has not been challenged) and the wife respondent had tolerated such activities, this is a clear indication that wife respondent is not a vicious person. She accepted the fact that the husband's infidelity was a passing fancy.

In the final analysis I am satisfied that the marriage has not been irretrievably broken down. The husband's infidelity is but a passing fancy considering that he had affairs with three different women at different times. It is quite probable that after some time he would reconcile with his wife after the flush of the extra marital affairs had ceased. It must be remembered that in recommending the enactment of English Divorce Reform Act 1969 (now replaced by the Matrimonial Causes Act 1973) the Law Commission Report (Cond. 3123) said at p. 15:

> (i) To buttress rather than to undermine the stability of, marriage and (ii) when regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with maximum fairness and the minimum bitterness, distress and humiliation.

Thus the Law Reform Act is not enacted for the purpose of encouraging divorce but also to buttress the stability of marriage where it is possible to do so.

For the above reasons, the husband's petition is dismissed with costs.

Also Found at [1991] 1 CLJ 815